

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 28, 2004

IN RE:

**UNITED CITIES GAS COMPANY, a Division of
ATMOS ENERGY CORPORATION
INCENTIVE PLAN ACCOUNT (IPA) AUDIT**

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**DOCKET NO.
01-00704**

ORDER DENYING UNITED GAS COMPANY'S MOTION TO DISQUALIFY WITNESS

This matter is before the Hearing Officer upon a motion filed on May 14, 2002 by United Cities Gas Company (hereinafter "Atmos Energy Corporation" or "Atmos") seeking to disqualify Dan McCormac from testifying as a witness in this Docket. Mr. McCormac was at the time of the filing of the motion the Chief of the Energy and Water Division of the Tennessee Regulatory Authority ("TRA" or "Authority"), but had previously been employed by the Consumer Advocate and Protection Division of the Attorney General ("Consumer Advocate").¹ The prior Hearing Officer in this Docket, Mr. Richard Collier, apparently had precluded Mr. McCormac from advising the Directors or TRA staff in regard to this Docket because Mr. McCormac's prior employment with the Consumer Advocate involved other related Dockets concerning the performance based rate mechanism ("PBR").² Both the staff of the Energy and Water Division ("Staff"), participating as a party, and the Consumer Advocate had listed Mr. McCormac as a potential witness in the hearing in this matter. Atmos sought to disqualify Mr.

¹ *United Cities Gas Company's Motion to Disqualify Witness*, p 1 (May 14, 2002)

² According to Atmos, Mr Collier advised it on April 30, 2002 and again ruled on the record at a pre-hearing conference on May 8, 2002 that Mr McCormac was precluded from advising the Directors or TRA staff in regard to this matter. See *United Cities Gas Company's Motion to Disqualify Witness*, p 1 (May 14, 2002)

McCormac based on its assertions that Staff and the Consumer Advocate were attempting to circumvent the Authority's ruling on Mr. McCormac's disqualification and that calling him as a witness did not remove the taint of impropriety that the Authority recognized in shielding him from the proceeding. The Consumer Advocate responded that Atmos had not made a showing to overcome the presumption that Mr. McCormac was a competent witness and that the assertion that the integrity of the process would be tainted was insubstantial and unsupported by any authority. On November 21, 2003, the Consumer Advocate filed a request for disposition of this motion, noting that Mr. McCormac was no longer employed by the TRA and again was employed by the Consumer Advocate. At a Status Conference held on April 22, 2004, the motion was argued by Atmos and the Consumer Advocate. Staff took no position on the Motion. Based upon the arguments presented by the Parties in their filings and at the Status Conference, the Hearing Officer concluded that the motion should be denied based on the reasons set forth below.

Witnesses generally are presumed competent to testify.³ However, Atmos argues that, because Mr. McCormac was prevented from advising or making recommendations to the decision makers as a staff member, he must likewise be prevented from appearing as a witness. Atmos has presented no support for this contention. Nor has Atmos presented any evidence that the integrity of the proceedings will be compromised if Mr. McCormac is allowed to testify. The Hearing Officer shares Atmos' interest in ensuring the integrity of these proceedings. The Authority has a responsibility to uphold the independence and impartiality of the decision makers, whether those decision makers are Directors or staff members acting as Hearing Officers, in this and all other matters. Indeed, while Mr. McCormac was employed as Chief of the Authority's Energy and Water Division, the Authority maintained that neutrality and

³ See Rule 601, Tennessee Rules of Evidence

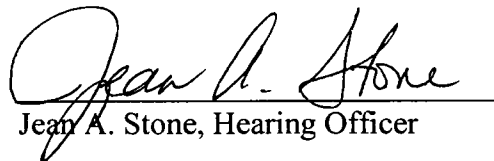
independence by preventing Mr. McCormac from advising or making recommendations to the decision makers in this Docket as well as in other pending matters in which the Consumer Advocate was a party.

Atmos contends that Mr. McCormac has previously expressed opinions and bias against the implementation of the PBR. Even if this assertion is taken as true, his opinions would not render Mr. McCormac incompetent to testify. Witnesses frequently have biases, but those biases do not render those witnesses incompetent to testify. Rather, the decision maker may consider bias in assigning weight in the consideration of their testimony.

Based on these reasons, the Hearing Officer finds that Atmos has failed to overcome the witness' presumed competency to testify, and therefore the motion should be denied.

IT IS THEREFORE ORDERED THAT:

United Gas Company's Motion to Disqualify Witness is denied.


Jean A. Stone, Hearing Officer

DOCKET NUMBER: 0100704

CASE NAME: AUDIT OF UNITED CITIES GAS COMPANY'S INCENTIVE PLAN ACCOUNT (IPA) FOR THE PERIOD OF APRIL 1, 2000, THROUGH MARCH 31, 2001.

Item No:	Date Filed:	Document
1	10/18/2002	Transcript Of Proceedings, Thursday, October 10, 2002
2	10/21/2002	UCGC's Memorandum In Response To The Motions For Summary Judgment Filed By The Staff Of The TRA And The CAD
3	10/21/2002	Exhibits To UCGC's Petition Regarding Affiliated Transaction And Request For Permission To Include New Agreement Covering East Tennessee-Nora Delivery Point (Proprietary-filed Under Seal In Docket Office)
4	10/21/2002	Affidavit Of Patricia Childers (Confidential-Filed Under Seal In Docket Office)
5	10/21/2002	UCGC's Response To The Statement Of Material Facts Submitted By The CAD
6	10/21/2002	Affadavit Of Frank H Creamer
7	10/21/2002	Affidavit Of John Hack
8	10/21/2002	Affidavit Of Mark Thessin
9	10/23/2002	Transcript Of Proceedings, Thrusday, October 10, 2002 (copy Not On Internet)
10	04/01/2003	Order On Motions For Summary Judgment
11	05/07/2003	Transcript Of Proceedings, Monday, April 7, 2003
12	06/19/2003	CAD's Motion For Leave To Submit Pre-Mediation Statement On June 19, 2003
13	11/21/2003	CAD's Request For Disposition Of United Cities' Motion To Disqualify Witness
14	03/08/2004	Motion To Consolidate And For Approval Of Settlement Agreement
15	03/26/2004	CAD's Motion For Extension Of Time To Respond To The Motion To Consolidate Filed By Atmos And Staff Of TRA
16	03/29/2004	Copy Of Attachments To The March 26th Filing By The CAD
17	04/15/2004	Notice Of Status Conference
18	04/28/2004	Order Granting Motion To Consolidate And To Approve Settlement Agreement On Part, Granting Motion For Extension Of Time To Respond In Part, And Setting Procedural Schedule

CASE NAME: PETITION BY UNITED CITIES GAS COMPANY TO AMEND THE PERFORMANCE BASED RATEMAKING MECHANISM RIDER TO ITS TARIFF

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 28, 2004

IN RE:

**UNITED CITIES GAS COMPANY, a Division of
ATMOS ENERGY CORPORATION
INCENTIVE PLAN ACCOUNT (IPA) AUDIT**

**DOCKET NO.
01-00704**

IN RE:

**PETITION OF UNITED CITIES GAS COMPANY
TO AMEND THE PERFORMANCE BASED
RATEMAKING MECHANISM RIDER TO ITS TARIFF**

**DOCKET NO.
02-00850**

**ORDER GRANTING MOTION TO CONSOLIDATE AND TO APPROVE
SETTLEMENT AGREEMENT IN PART, GRANTING MOTION FOR
EXTENSION OF TIME TO RESPOND IN PART, AND SETTING
PROCEDURAL SCHEDULE**

This matter came before the Hearing Officer at a Status Conference held on April 22, 2004, to address various pending motions filed by the Parties in Docket Nos. 01-00704 and 02-00850. On March 8, 2004, the Staff of the Energy and Water Division of the Tennessee Regulatory Authority ("Staff") and United Cities Gas Company (hereinafter "Atmos Energy Corporation" or "Atmos") jointly filed a *Motion to Consolidate and to Approve Settlement Agreement*. In that motion, Staff and Atmos proposed a single agreement to settle the issues in both Dockets and requested consolidation of the two Dockets.

On March 26, 2004, the Consumer Advocate and Protection Division ("Consumer Advocate") filed a *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement*, which included a request for summary denial of the *Motion to Consolidate and to Approve Settlement Agreement* or, in the alternative, additional discovery and supporting material for the *Motion to Consolidate and to Approve Settlement Agreement* prior to the Consumer Advocate filing its response.¹

At the Status Conference held on April 22, 2004, the Parties agreed to address the issue of consolidation of the Dockets separate from consideration of the issue of approval of the settlement agreement. The Hearing Officer found that Docket No. 01-00704 and Docket No. 02-00850 were significantly related and that consolidation of the Dockets would conserve resources and assist in bringing matters to a resolution. Therefore, the Hearing Officer granted the *Motion to Consolidate and to Approve Settlement Agreement* in part, but only to the extent that these Dockets were ordered to be consolidated and all future filings in these matters were ordered to occur in Docket No. 01-00704. The remainder of the motion requesting approval of the settlement agreement was held in abeyance pending additional discovery and a hearing.

In its *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement*, the Consumer Advocate requested summary denial of the *Motion to Consolidate and to Approve Settlement Agreement* or, in the alternative, additional discovery and supporting material for that motion prior to the Consumer

¹ As part of its *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement*, the Consumer Advocate also requested a decision on *United Cities Gas Company's Motion to Disqualify Witness*, filed by Atmos on May 14, 2002. After due consideration, the Hearing Officer denied *United Cities Gas Company's Motion to Disqualify Witness* at the Status Conference held on April 22, 2004. Therefore, although not specifically addressed in this Order, the Consumer Advocate's request for a decision was granted.

Advocate filing its response. Staff and Atmos indicated no opposition to the Consumer Advocate's request for additional time to respond or for additional discovery limited to specific issues. Staff and Atmos opposed the request for summary denial and the request that their motion be supplemented with supporting material.

Based upon the arguments presented by the Parties, the Hearing Officer found the Consumer Advocate's request for additional time to respond and for additional discovery prior to that response was well-taken, but the Consumer Advocate's request for a summary denial of the joint motion and request for the joint motion to be supplemented with supporting material should be held in abeyance pending additional discovery and a hearing. Therefore, the *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement* was granted in part, but only to the extent of allowing additional discovery and an extension of time for the Consumer Advocate to respond.

By agreement of the Parties, additional discovery will be limited to the issue of "whether the proposed settlement agreement is in the public interest." The Consumer Advocate will include in its response: 1) its objections to the proposed settlement agreement; and 2) a discussion of whether the motion for approval of the settlement agreement should be summarily denied based upon the lack of agreement by all parties in this matter. The Consumer Advocate may discuss the burden of proof applicable to the *Motion to Consolidate and to Approve Settlement Agreement*.

Staff and Atmos were granted leave to file a reply to the Consumer Advocate's response pursuant to Tenn. Comp. R.& Regs. 1220-1-2-.06(3).

The Parties jointly presented a proposed procedural schedule, which was accepted by the Hearing Officer. The procedural schedule was ordered as indicated below:

April 30, 2004	Discovery requests, limited to the issue as set forth above, shall be filed with the TRA and served on all Parties.
May 4, 2004	Objections to Discovery Requests shall be filed with the TRA and served on all Parties.
May 7, 2004	Responses to Discovery Requests not objected to shall be filed with the TRA and served on all Parties.
May 10, 2004	Hearing on Objections to Discovery Requests shall begin at 10:30 a.m. (central). Schedule for Additional Responses to Discovery Requests may be set at this hearing.
May 17, 2004	Consumer Advocate's Response to the <i>Motion to Approve Settlement Agreement</i> shall be filed with the TRA by 12 noon (central) and served on all Parties.
May 21, 2004	Reply by Atmos and Staff shall be filed with the TRA and served on all Parties.
June 8, 2004	Hearing shall begin at 11:00 a.m. (central)

All filings shall be due at the close of business on the dates indicated unless otherwise noted.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Consolidate and to Approve Settlement Agreement* filed by Atmos and the Staff of the Energy and Water Division is granted in part, in that Docket No. 01-00704 and Docket No. 02-00850 are hereby consolidated. The record in Docket No. 02-00850 shall be part of the record in Docket No. 01-00704 and all future filings


will occur in Docket No. 01-00704. Docket No. 02-00850 shall be deemed closed after entry of this Order.

2. The remainder of the *Motion to Consolidate and to Approve Settlement Agreement* filed by Atmos and the Staff of the Energy and Water Division shall be held in abeyance pending additional discovery and/or a hearing.

3. The *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement* filed by the Consumer Advocate is granted in part, in that the Consumer Advocate is hereby granted additional discovery and additional time to file a response, subject to the limitations agreed upon by the Parties.

4. The remainder of the *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement* filed by the Consumer Advocate is held in abeyance pending additional discovery and/or a hearing.

5. The Procedural Schedule set forth above is hereby adopted, subject to the conditions and limitations agreed upon by the Parties.


Jean A. Stone, Hearing Officer